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63173-0

NO. 63173-0-1

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CROW ROOFING & SHEET METAL, INC.,

Appellant/Cross Respondent,

vs.

JULIUS THIRY and KATHERINE J. THIRY, husband and wife, and
the marital community composed thereof;

and

JULIUS THIRY and KATHERINE J. THIRY, Trustee of the THIRY
REVOCABLE LIVING TRUST

Respondents/Cross Appellants.

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I

BRIEF OF APPELLANT

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ORIGINAL

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I. INTRODUCTION

In 2005, Crow Roofing & Sheet Metal, Inc. (“Crow Roofing”) replaced an existing roof and installed a slate roof on the residence of Julius and Katherine Thiry (“the Thirys”). The Thirys paid a deposit but failed to pay the balance of the contract in the approximate amount of \$102,000.00 upon completion of the installation. Crow Roofing filed this action to recover the balance due on a roofing contract, to foreclose its mechanic’s lien, for interest and for reasonable attorneys’ fees. The Thirys counterclaimed for defective workmanship for damages for repair of the alleged defects and/or for complete replacement of the roof. During the course of the proceeding, certain claims for damages caused by water intrusion were settled.

After a three-day bench trial, the trial court took the matter under advisement and instructed the parties to submit proposed Findings of Fact, Conclusions of Law and Judgment. Ultimately, the Court entered its findings that (a) there was a valid contract between the parties; (b) there was no dispute as to the balance of the contract price owed by the Thirys to Crow Roofing; (c) specific defects were attributable to Crow Roofing’s workmanship and the Thirys were entitled to damages for repairs in the amount of

\$57,000 plus tax, to be set off against the amount owed to Crow Roofing; (d) the Thirys were the prevailing party for purposes of attorneys' fees and costs and were awarded their fees and costs; and (e) denied Crow Roofing's claim for prejudgment interest on the unpaid contract amount.

In summary, the issues presented by Crow Roofing before the appellate court are (1) the nature and extent the Thirys' claim for damages attributable to Crow Roofing's workmanship; (2) the calculation of the amount of the offset awarded to the Thirys; (3) whether Crow Roofing is entitled to prejudgment interest on the unpaid contract amount; and (4) a determination of which party is the prevailing party for purposes of claims for an award of attorneys' fees and costs and the amount to be awarded.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

Errors Assigned to Findings of Fact and Conclusions of Law entered November 3, 2008 and Judgment entered February 20, 2008.

No. 1: The trial court erred in Finding of Fact 2.5 in finding that "Crow Roofing failed to notice a warped rafter tail, which eventually caused an undulation in the slate roof installed by Crow." CP 746.

No. 2: The trial court erred in Finding of Fact 2.16 that the “failure to detect the defective rafter tail constituted a breach of Crow’s responsibilities under the contract.” CP 749.

No. 3: The trial court erred in Finding of Fact 2.17 that “Plaintiff did not call Defendants’ attention to the defect, which could have been remedied prior to installation of the slate. The defect causing the undulation in the roof line just over the gutters has caused damage to the Thiry’s [sic].” CP 749.

No. 4: The trial court erred in Finding of Fact 2.7 in finding the “Defendants do not dispute the unpaid amount due under the contract.” CP 747.

No. 5: The Trial court erred in Finding of Fact 2.14 that the “parties discussed the ‘look’ of the roof...” CP 748.

No. 6: The trial court erred in Finding of Fact 2.19 that “[t]he copper flashing installed as finish work by Plaintiffs was substandard in appearance and functionality.” CP 749.

No. 7: The trial court erred in Finding of Fact 2.19 that “[t]he flashing at this point [as the roof meets the gutter line] around the entire home is insufficient to protect the roof from weather and foreign debris and must be reworked.” CP 749.

No. 8: The trial court erred in Finding of Fact 2.20: “The contract calls for copper flashing on the entire roof. Contrary to this term and condition of the contract, Plaintiff employed a method of dealing with the subject roof’s transition in pitch as it approaches the gutter line. The contract between the parties requires the use of copper transition flashing under the slate at the pitch transition on the roof. In spite of this requirement, Plaintiff chose to employ wooden shims under the tiles instead of the copper flashing, called for in the contract.” CP 749.

No. 9: The trial court erred in Finding of Fact 2.22: “A reasonable cost of repair is to remedy known defects, in the amount of \$57,000 plus tax.” CP 750.

No. 10: The trial court erred in failing to find that Plaintiffs were entitled to prejudgment interest on the unpaid contract amount. RP 2/20/09, p. 7, ll. 23 – p. 8, ll. 19;

No. 11: The trial court erred in Conclusion of Law 3: “The terms and conditions of the written agreement between the parties were not adhered to by Plaintiff. Defendant is entitled to an offset of \$57, 000 pl tax from the amount due Plaintiff.” CP 750.

Errors Assigned to Order Awarding Defendants Reasonable Attorneys Fees entered November 21, 2008. CP 882-883.

No. 12: The trial court erred in finding “[t]hat the Defendants Thiry are the prevailing party and are entitled to recover reasonable attorneys’ fees and costs incurred in pursuing it [sic] claim for breach of contract.” CP 882-883.

No. 13: The trial court erred in awarding Defendants attorneys’ fees and costs in the amount of \$57,811.08, later adjusted to \$66,416.54 in the Judgment. CP 883.

B. Issues Pertaining to Assignments of Error

No. 1: The contract provided that Crow Roofing was to inspect the decking for dry rot and deterioration and replace the decking as necessary on a time and materials basis as an extra to the contract price. Did Crow Roofing have an obligation under the contract to notice or discover, repair and/or replace a warped rafter tail? (Assignments of Error No. 1, No. 2 and No. 3);

No. 2: Where a contract does not contain an aesthetics clause and there is no evidence that the parties viewed examples of or discussed the specific look of the replacement roof, and where the roof is otherwise structurally sound, to what extent can a party

complain of a breach of contract if the party does not like the “look” of the roof? (Assignments of Error No. 5, No. 6 and No.7);

No. 3: To what extent can a written contract be changed by oral direction or acquiescence of the parties? (Assignment of Error No. 8);

No. 4: Where the contractor’s claim for the unpaid contract amount of \$102,416.83 is sustained; where the homeowners’ claim in the amount of \$170,000.00 for a complete replacement of the roof was rejected; and where the homeowners are awarded an offset of \$57,000 plus tax (total: \$62,073); which party, if any, is the prevailing party for an award of attorneys’ fees and costs. (Assignments of Error No. 4, No.10, No. 12 and No.13);

No. 5: Was the testimony and/or evidence presented at trial sufficient to establish that a reasonable amount to be awarded for the cost of specific roof repairs was \$57,000.00? (Assignments of Error No. 6, No. 7 and No. 9); and

No. 6: Is Crow Roofing entitled to pre-judgment interest on its unpaid claim under the contract? (Assignment of Error No. 10)

III. STATEMENT OF THE CASE

The Contract. In the spring of 2005, Dr. Julius Thiry contacted Crow Roofing to prepare a bid for installation of a slate roof on his

residence in Redmond, Washington. Crow Roofing submitted an initial proposal and bid, dated May 4, 2005 (Ex. 2) and a revised bid dated May 20, 2005 (Ex. 3). Dr. Thiry prepared a hand-written list of sixteen items that he required be included in the contract. Ex. 6. Crow Roofing added these items to the bid and entered into a contract with the Thirys dated June 6, 2005, incorporating Dr. Thiry's specifications of the installation and setting the agreed-upon price. Ex. 7 and 45. One provision of the contract stated that Crow Roofing would "[t]horoughly inspect the decking for signs of deterioration or dry rot. As the condition of the decking cannot be determined prior to removal, we will replace decking as necessary on a time and material basis as an extra cost." The contract also provided: "9. All flashings to be 16 oz. copper." It did not address the specific issue of transitional flashing. Also, the Contract did not contain an aesthetics clause or reference to the "look" of the new roof which would give the Thirys the right to reject the roof if they did not like the way it looked when completed.

After executing the contract, Dr. Thiry determined that he wanted attic ventilators and copper gutters, and on July 7, 2005, accepted Crow Roofing's bid for attic ventilators. Ex. 10. In September 2005, Dr. Thiry requested that Crow Roofing install a

copper horse weather vane, and accepted Crow Roofing's bid for the work on September 26, 2005. Ex. 11.

Contract Price. The contract price (including additional work orders issued after the original contract was signed) was \$152,416.83 plus SST. Crow Roofing was paid an initial deposit of \$50,000, with the remainder due upon completion. Ex. 14.

Installation of the Slate Roof. Crow Roofing began installation in the latter part of June 2005, due, in part, to a delay in delivery of the special order for the natural slate. During installation, an issue arose as how to best install flashing at the transition in the slope of the roof. The steep pitch of the roof lessened a few feet before the gutter line. This change in pitch required special treatment since the rigid slate, unlike conventional asphalt shingles, could not conform to the transition in the roof's slope. RP 9/23/08 157, II 18 - p. 159, II 10. The Thirys pointed out instances of "crooked" or uneven placement of slate, pointed these out to the workmen, and certain sections of the installation were re-done. Otherwise, no other defects were pointed out to Crow Roofing during the installation or prior to completing the job.

During installation of the roof, the interior of the residence did sustain some water damage after a worker stepped through a water

barrier, but during pendency of the suit, these claims were settled and dismissed. (See discussion herein.)

Completion of the Contract. Crow Roofing completed installation of the roof in December 2005, except for installation of the weather vane, which was completed in March 2006, and subsequent repair and replacements of a few of the slate tiles that became loose.

Complaint/Amended Complaint. On or about January 13, 2006, Crow Roofing sent the Thirys its invoice for the balance due under the contract, \$102,416.83 plus SST. The Thirys refused to pay the balance due on the agreed-on price under the contract. Crow Roofing recorded its materialmen's lien on April 20, 2006 (Ex. 18), and finally filed a suit for money damages and to foreclose its lien on September 8, 2006. CP 1-28. On July 1, 2008, Crow Roofing filed its Amended Complaint to reflect that the Thirys had transferred their residence to the Thiry Revocable Living Trust and adding the Trust as a party. CP 509-538.

Crow Roofing sought judgment against the Thirys and the Trust for \$102,416.83 together with interest at the statutory rate of 12% per annum from March 10, 2006 until paid.

Counterclaim. The Thirys counterclaimed for breach of contract, alleging defective workmanship in installation of the roof and for interior damage caused by leaks that occurred during the installation process as well as issues pertaining to the look of the roof. CP 42-46.

Intervenor Complaint. On or about May 18, 2007, the Court granted the Motion of Intervenor Vigilant Insurance Company (the Thirys' homeowners insurance carrier) to intervene. CP 93-101 / 112-120 (Motion); CP 128-129 (Order). Pursuant to the terms and conditions of the Thirys' homeowners insurance policy, Vigilant paid the Thirys the sum of \$54,648.51 for interior water damage caused by water intrusion that allegedly occurred during the installation of the roof. There has been no judicial review or finding that Crow Roofing caused the water intrusion.

Mediation. The parties mediated their claims before mediator Sherman L. Knight on March 31, 2008. A Status Report pursuant to KCLR 16(c) was filed on or about April 14, 2008, indicating that no settlement had been reached. CP 149-151.

Dismissal of Parties. Initial Defendants Washington Mutual Bank and King County DES, who were entities with interests in the title to the residential property, were voluntarily dismissed on the

basis that their recorded interests in the real estate are prior to the lien recorded by Crow Roofing. CP 152-156.

Partial Summary Judgment. During the pendency of this action, Vigilant settled all claims between the insurance carrier and the Thirys. On or about April 1, 2008, Crow Roofing filed a Motion for Partial Summary Judgment to dismiss the Thirys' counterclaim for damages to the interior of their residence since the insurance carrier had agreed to pay those damages. CP 161-170. A Stipulation and Order of Dismissal with Prejudice as to the claims against Vigilant Insurance was entered herein on December 4, 2007. CP 130-132. The Thirys retained the right to make claims against their own homeowner's policy with Vigilant Insurance for any additional property damage or resultant damage that could be proven.

Since Vigilant agreed to be responsible for interior damage claims attributable to the leaks that occurred during the roof installation, Crow Roofing filed its Motion to dismiss the claims for those damages. CP 161-170. Defendants did not oppose the Motion and stipulated to entry of an Order granting the Motion. On May 6, 2008, the Court entered its Order Granting Crow Roofing's Motion for Partial Summary Judgment dismissing the interior

damage claims attributable to the leaks that occurred during the roof installation. CP 313-317.

Trial. Judge Lum's Order of May 6, 2008 granting partial summary judgment provided: "The only issues remaining for trial will be Crow Roofing and Sheet Metal's claim for payment and/or lien foreclosure and the Thiry's counterclaim for repair and/or replacement of the roof itself. No claims for damages outside of the roof itself remain for trial." CP 313-317. The only issues remaining for trial were (a) Crow Roofing's claim for breach of contract to recover the unpaid portion of the roofing contract, and its entitlement to interest thereon; (b) Crow Roofing's claim for foreclosure of its lien; (c) the Thirys' counterclaim for repair of the roof; and (d) the award of attorneys' fees and costs.

Trial was held on September 18, 22 and 23, 2008, before the Honorable Michael J. Fox.

Findings of Fact and Conclusions of Law. The Court entered its Findings of Fact and Conclusions of Law on November 3, 2008. CP 742-750.

Order Awarding Defendants Reasonable Attorneys' Fees. The Court entered its Order finding that the Thirys were the prevailing party, denied an award of pre-judgment interest on the unpaid portion

of the contract price, and awarded the Thirys attorneys fees and costs in the amount of \$57,811.08. The Defendants were directed to prepare and submit for entry a proposed Judgment incorporating the award made under its Findings of Fact and Conclusions of Law of November 3, 2008 and the attorneys' fees and costs awarded to the Thirys. CP 882-883.

Judgment. Plaintiff brought a Motion to reduce the Court's rulings to judgment with hearing held February 20, 2009. Judgment was entered on February 20, 2009, after a hearing before Judge Fox. CP 921-923. At that time, the award of attorneys' fees and costs in favor of the Thirys was amended to add additional costs, for a total award of \$66,416.54. The final judgment amount awarded in favor of the Thirys, after set-off of the unpaid contract price, was \$26,072.01.

IV. ARGUMENT

A. **Introduction: The Trial Court's Findings are not Supported by Substantial Evidence or are Actually Conclusions of Law.**

This appeal assigns error to several findings of fact that (1) are not supported by substantial evidence or (2) are actually conclusions of law subject to review.

It is well-established by Washington case law that the appellate court will not substitute its judgment for that of the trial court on disputed issues of fact. Thorndike v. Hesperian Orchards, Inc., 54 WN.2d 570, 343 P.2d 183 (1959). As long as substantial evidence supports the findings of fact, they will not be disturbed on appeal. Thorndike at 575.

Since Thorndike v. Hesperian Orchards, Inc., 54 Wash.2d 570, 343 P.2d 183 (1959), the courts have refined the rule to provide that an appellate court may review findings of fact by the trial court to determine if they are supported by substantial evidence. Similarly, the courts have held: "It is, however, the function of any appellate court to determine questions of law. If what is in fact a conclusion of law is wrongly denominated a finding of fact, it is, nevertheless, subject to review." Local Union 1296, Int'l Ass'n of Firefighters v. Kennewick, 86 Wash.2d 156, 161-62, 542 P.2d 1252 (1975). Barnett v. Buchan Backing Co., 45 Wash. App. 152, 724 P.2d 1077, Wash. App., 1986 at 156.

A trial court's decision following a bench trial is reviewed to determine whether the findings are supported by substantial evidence and whether those findings support the conclusions of law. Dorsey v. King County, 51 Wn.App. 664, 668-69, 754 P.2d

1255 (1988). Substantial evidence is a quantum of evidence sufficient to persuade a rational and fair minded person that the premise is true. Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

B. The Trial Court Erred in Finding that Failure to Detect an Existing Warped Rafter Tail was a Breach of the Contract and that the Defendants were damaged as a result.

1. Crow Roofing Did Not Have an Obligation Under the Contract to Detect or Repair the Warped Rafter Tail.

The trial court's finding of fact 2.5 stated that "[t]he contract provided that following the tear-off of the old roof, Crow Roofing would inspect the decking for signs of deterioration or dry rot and replace the decking as necessary on a time and materials basis as an extra to the contract price. Crow Roofing failed to notice a warped rafter tail, which eventually caused an undulation in the slate roof installed by Crow." CP 746. Its Finding of Fact 2.16 stated that the "failure to detect the defective rafter tail constituted a breach of Crow's responsibilities under the contract." CP 749. Finding of Fact 2.17 stated in part that the "defect causing the undulation in the roof line just over the gutters has caused damage to the Thirys." CP 749. The trial court erred in concluding that the contract required Crow Roofing to detect a warped rafter tail and

that failure to detect the warped rafter tail constituted a breach of the contract. In addition, the conclusion that the undulation caused damage to the Thirys is not supported by substantial evidence.

The contract between Crow Roofing and the Thirys stated that Crow Roofing would “[t]horoughly inspect the decking for signs of deterioration or dry rot. As the condition of the decking cannot be determined prior to removal, we will replace decking as necessary on a time and material basis as an extra cost.” Ex. 7.

“Decking” was not defined in the contract. Generally, “decking” is the surface onto which the roofing materials are attached. The court appears to have based its finding on a misinterpretation of testimony of the Thirys’ expert witness, Bryce Given, where he stated:

“[t]his [the warped rafter tail] is not attributed to rot, but is deterioration – excuse me – it’s attributed to deterioration of the plane of that truss tail or the rafter tail. RP 9/23/08 p.170, ll 4-7.

However, Given further testified that “decking” as contemplated in the contract was the surface onto which the shingles would be nailed.

Q. Okay? Now, what is decking?

A. Decking is, for this particular project, would most likely have been the skip sheeting, which would have been in place for the wood roofing that was already in place prior to the new slate roofing—going on. Skip sheeting is basically one-by-six or one-by-four that is run horizontally to the roof, and then there is a skip or a

space about the same width as the wood and then another piece – it's basically to give backing to nail wood shingles or wood shakes into.

RP 9/18/08 p. 165, ll 5-20.

Decking did not include the rafters or rafter tails. Rafters would be considered part of the structural system of the roof. The contract specifically advised the Thirys to consult “a qualified engineer to verify the structure can handle the weight of the system.” Exs. 7 and 45.

Finally, there was testimony at trial that at the time of the roof installation, the area around the warped rafter tail was covered by tree foliage, making detection of the undulation in the roof line difficult, if not impossible, until the foliage was later removed by the Defendants after the roof was installed. RP 9/23/08 p. 30-33; 73. Crow Roofing's expert witness, Ray Wetherholt, testified that most of the time the irregularity could not be seen and that the irregularity could be corrected only by shaving down the rafter tail, which is usually beyond the scope of roofing contracts, and the action might compromise the structural integrity. RP 9/23/08 p. 142. No evidence was presented that this condition was complained about until it was noted in Mr. Given's report, CP 41.

The facts do not establish that Crow Roofing had a responsibility under the contract to detect structural defects in the roof. In fact, the contract excluded that responsibility from the scope of Crow Roofing's work. The trial court erred in concluding that "failure to detect the defective rafter tail constituted a breach of Crow's responsibilities under the contract."

2. The Thirys were not damaged by the undulation in the roofline.

Even if Crow Roofing had an obligation under the contract to detect the warped rafter tail and had, in fact, been able to detect the warped rafter tail, Crow Roofing was not obligated under the contract to repair it without extra compensation. The contract clearly stated: "*we strongly advise consulting a qualified engineer to verify the structure can handle the weight of this system.*" Ex 7 and 45.

Moreover, the evidence presented at trial established that the slight undulation did not affect the structural integrity or function of the roof. In his testimony, Defendants' expert, Bryce Given, stated that although he felt the installation over the rafter tail was defective, it did not affect the roof's performance and was only a "cosmetic" issue. RP 9/18/08 p. 171, ll 21-25. He also testified that

he did not discuss with the Thirys whether they had had an engineer verify that the structure was sound enough to bear the weight of the slate system. RP 9/22/08 p. 17 – p. 18, ll 6.

Similarly, the testimony of Ray Wetherholt, the Plaintiff's expert, indicated that not only did the undulation not create any damage to the roof, but that attempting to shave down the rafter tail to smooth out the undulation might compromise the structural integrity. RP 9/23/08 p. 142, ll 16-22.

The Trial Court erred in including repair of the warped rafter tail in its award of damages.

C. The Trial Court Erred in Concluding that Aesthetics Were “an Important Consideration of the Contract.”

The trial court's Finding of Fact 2.14 that the “parties discussed the ‘look’ of the roof...” and its conclusions and comments at the end of the trial that “it seems like aesthetics were the most important consideration of this whole contract” are in error. CP 748. The written contract between the parties did not contain an aesthetics clause or a provision that the Thirys could reject the roof if they did not like the way it looked.

The Thirys acknowledged prior to trial that their primary objection to Crow Roofing's work was not the functionality of the roof but the fact that they did not approve of the way it looks. During his deposition (Ex. 28), Dr. Thiry testified that except for 3 or 4 tiles having fallen off (and subsequently replaced),¹ he did not articulate any other problems:

- Q. Other than slates coming off, have you had any other problems with the roof?
A. Major aesthetical problems.

Deposition of Julius Thiry, November 7, 2007
Page 34, ll 12-14, Ex. 28

Mrs. Thiry testified that she was not shown pictures as to what the roof would look like and that she did not show any pictures to Crow Roofing as to how she had expected the roof to look. RP 9/22/08 p. 130, ll. 5-11. Dr. Thiry testified that when he pointed out a course of tiles that were not straight, the Crow Roofing workmen corrected the problem. RP 9/22/08 p. 153, ll. 11-25, p. 154, ll 1-8.

¹ Ray Wetherholt estimated that there were an estimated 28,000 – 32,000 slate tiles installed over the 8,500 sq. ft. roof, a fact that was adopted by the court in Finding of Fact 2.12. Mr. Wetherholt further testified that in his experience in reviewing other tile roofs, alignment of tile and hip and ridge slates vary and the Thiry roof was not extraordinarily different from the ones he had reviewed.

There was no aesthetics clause in the contract and no provision that the Thirys could reject the roof if they did not like the way it looked. Moreover, Dr. Thiry was not qualified to testify as to the standard of aesthetics in the roofing industry and no expert testimony was presented regarding the acceptable industry standard aesthetics of a slate roof.

A contractor is not required to construct a perfect house, and in determining whether a house is defective, the test is reasonableness and not perfection Atherton v. Blume Development Company, 115 Wn.2d 506, 799 P.2d 250 (1990), citing Waggoner v. Midwestern Dev. Inc., 83 S.D. 57, 68, 154 NW 2nd 803 (1967).

D. The trial court erred in finding that the flashing as the roof meets the gutter line around the entire home is insufficient to protect the roof from weather and foreign debris and must be reworked.

The trial court erred in Finding of Fact 2.19 that “[t]he flashing at this point [as the roof meets the gutter line] around the entire home is insufficient to protect the roof from weather and foreign debris and must be reworked.” CP 749. This finding is not supported by substantial evidence.

The court apparently relied on the testimony of Bryce Given where he stated that he had not observed any ice and water shield under the three or four locations he checked. RP 9/22/08 p. 55, II 11 - p. 56, II 1. However, Mr. Given, upon questioning, did acknowledge that the ice and water shield might be there:

Q. Okay. But it could be there; it's just covered up, correct?

A. It might be there, although I think I would have observed it.

RP 9/22/08 p. 56, II 2-5.

The testimony of Plaintiff's expert, Raymond Wetherholt, unequivocally states that he inspected the roof, lifted the slate, and found that the ice and water shield had in fact been installed. RP 9/23/08 p. 138, II 17 - p. 139, II 10.

In addition, uncontroverted testimony shows that Dr. Thiry intended to install leaf guards and, accordingly, would be installing new half-round gutters and new flashing after the gutters were installed. RP 9/22/08 p. 37 II 23-25, p. 38 II 1-10. The leaf guards and gutters were apparently never installed by the Thirys. Wetherholt testified that there was no requirement that flashing extend further into the gutter and that overlap would have made it difficult to install the gutters and leaf guard. RP 2/22/08 p. 159 II

13-25, p. 160 ll. 1-21. There is no substantial evidence that the roof-line flashing was insufficient; or, if it was, the testimony was uncontroverted that the condition resulted from Thiry's plan to install a different gutter.

E. The Trial Court Erred in Concluding that a Modification of the Contract Regarding the Transitional Flashing had to be in Writing, That Copper Transitional Flashing Was Required, and That Crow Roofing Breached the Contract by Using Wooden Shims and Slate for the Transitional Flashing.

1. There was an oral modification of the contract, and acceptance of the modification by the Thirys, to change the transitional flashing from copper sheeting to wooden shims.

The trial court's Finding 2.20 stated that the contract called for

"copper flashing on the entire roof. Contrary to this term and condition of the contract, Plaintiff employed a method of dealing with the subject roof's transition in pitch as it approaches the gutter line. The contract between the parties requires the use of copper transition flashing under the slate at the pitch transition on the roof."

CP 749.

As the trial testimony established, the Thiry's roof had a steep slope of almost a 45 degree angle. RP 9/18/08 p. 116, ll 25 - 117, ll 5. As the roof approached the edge by the gutters, the slope changed. Plaintiff's expert testified that, in contrast to a composition shingle roof, where the shingles would conform to the shape of the roof, the

rigidity of the slate would not permit installation of slate at this abrupt slope change. RP 9/23/08 p. 157, ll 18 - 159, ll 10. In order to accommodate the change in the slope, and provide protection to the roof, either the slope had to be adjusted to allow for the slate to be installed or exposed metal transitional flashing would need to be installed at the slope change around the perimeter of the roof. RP 9/23/08 157, ll 18 - p. 159, ll 10. While the contract did call for copper flashing, it did not address the specific issue of transitional flashing. Instead of installing the copper flashing, Plaintiff installed a series of shims to modify the change in slope, thus allowing the installation of slate over the area, rather than exposed copper sheeting. The testimony of Ray Wetherholt indicated that this was an acceptable method to address the slope transition. RP 9/23/08 p. 143, ll 5-7.

Thirys' expert Given (who admitted that he had had no prior experience with installation, repair or formulation of specifications for slate roofs, either during his career as a contractor or as a consultant, RP 9/18/08, p. 187, ll. 12-25, p. 188, p. 1-21), acknowledged on cross-examination that there was no regulatory or industry code requirement that transitional flashing must be metal. RP 9/22/08, p. 13 ll 3-19, p. 14 ll. 1-10. Based on the

testimony of the witnesses, there is no evidence that would support the trial court's Finding of Fact 2.20.

The dispute regarding whether or not the contract required copper transitional flashing was resolved by the trial court's oral ruling that required a modification to this contract provision be in writing. RP 9/23/08 p. 196, ll 7-23. Witness Charles Trichler's testimony (Crow Roofing foreman) was that the change was at the direction of Mr. Thiry because he determined that he did not like the look of the bare copper extending around the perimeter of the roof. The trial court, however, stated that the contract spoke for itself and that any modification would have had to be in writing, and thus found that the contract required copper transitional flashing instead of the wood shim process used by Crow Roofing.

THE COURT: First of all, I think that the Exhibit 7 is the contract between the parties. As I understand it, Exhibit 7 was never amended in writing. This is the contract between the parties. It was negotiated, Mr. Thiry proposed additional conditions, and it was signed by both sides.

Numbered – Condition Number 9 is “All flashings to be of 16 – ounce copper.” That to me is unambiguous. It was never amended in writing. “all flashings” means all flashings, and if there is an argument that this oral statement about “We want to put wood under this transition down low on the roof” is put forth as a different contract condition, my impression is it has to be in writing.

RP 9/23/08 p. 195, ll. 9 – 24.

The contract did state that flashing would be copper. However, the contract did not address the issue of a slope transition and thus did not specify what type of material would be used specifically for the slope transition. RP 9/23/08 P.44, ll 18-23; Exs. 7 and 45. Dr. Thiry's testimony at trial established that when Crow Roofing approached Dr. Thiry regarding how best to address the slope transition issue, Dr. Thiry left it up to Crow Roofing to come up with a suitable solution. RP 9/18/08 p. 108, ll 9-13.

At trial, the testimony of Charles Trichler established that Dr. Thiry did not want the exposed copper at the slope transition:

A. We went over a couple of different ways of how we were going to do that where the pitches change. We discussed the metal. Mr. Thiry told me that the existing roof never had metal, and he asked me how much it would be metal. I said around the whole house. He didn't want that. So we came – we tried putting short courses in at that point to show him what it would look like. He didn't like that, so we came up with what we came up with out of the slate, by putting in the siding.

Q. And using beveled siding?

A. Uh-huh.

Q. Okay. Did you insert or assemble more than one example for him to see the transition flashing?

A. We actually started doing that. We did it three times right there at the beginning of the job, right above the garage right where you are saying the high rafter is.

Q. And his decision was what?

A. That we were going with the beveled siding just the way it's done now.

RP 9/23/08 p. 36, ll 25 – p. 37, ll 22.

The trial testimony of John Flanagan also established that use of the beveled siding and slate instead of the copper flashing was Dr. Thiry's decision because he did not want the exposed copper around the perimeter of the house. RP 9/23/08 p. 77, ll 22 - p. 78, ll 10.

Finally, the actions of the Thirys indicate that they accepted the beveled siding and slate as an alternative to the copper flashing. First, Dr. Thiry did not offer any testimony that he requested that the beveled siding and slate transition be redone with copper. In fact, testimony of John Flanagan indicated that metal caps for the beveled siding were requested by Dr. Thiry. RP 9/23/08 p. 87, ll 11-17; p. 115, ll 17-22.

2. An oral modification is an acceptable method of altering an existing written contract.

The right to modify a written contract by a subsequent oral one is unquestioned. Hardy v. Brady, 17 Wash.2d 775, 137 P.2d 505, (1943) citing Kelly Springfield Tire Co. v. Faulkner, 191 Wash. 549, 555, 71 P.2d 382. Ritchie v. State, 39 Wash. 95, 81 P. 79; 20 Amer.Juris. § 1163, p. 1016.

The parties can modify a contract by subsequent agreement. Ebling v. Gove's Cove, Inc., 34 Wn.App. 495, 499, 663 P.2d 132 (1983). Such modifications may also be shown through subsequent behavior. Davis v. Altose, 35 Wn.2d 807, 814, 215 P.2d 705 (1950). An oral modification to a written contract must be shown by clear and convincing evidence. See Tonseth v. Serwold, 22 Wn.2d 629, 644, 157 P.2d 333 (1945); Dinsmore Sawmill Co. v. Falls City Lumber Co., 70 Wash. 42, 44, 126 P. 72 (1912).

Even where a contract contains a clause that any change in the work should be made only upon written orders, an oral modification can be upheld, since in Washington, 'a contract clause prohibiting oral modification is essentially unenforceable because the clause itself is subject to oral modification.' Pacific N.W. Group A v. Pizza Blends, Inc., 90 Wn.App. 273, 277-78, 951 P.2d 826 (1998) (citing Kelly Springfield Tire Co. v. Faulkner, 191 Wash. 549, 554-56, 71 P.2d 382 (1937)); see also Consol. Elect. Distrib., Inc. v. Gier, 24 Wn.App. 671, 677-78, 602 P.2d 1206 (1979).

In Washington, 'a contract which the statute [of frauds] requires to be in writing cannot be abrogated or rescinded by a subsequent oral contract, unless such oral contract is accompanied by acts of part performance sufficient to remove the requirement that it shall

be in writing.’ Woolen v. Sloan, 94 Wash. 551, 553, 162 P. 985 (1917). But ‘[i]t is well settled ... that an agreement required by law to be made in writing may be modified or abrogated by a subsequently executed oral agreement.’ Kelly Springfield Tire Co. v. Faulkner, 191 Wash. 549, 554, 71 P.2d 382 (1937).

In Gerard-Fillio Co. v. McNair, 68 Wash. 321, 123 P. 462 (1912), our Supreme Court declared that executed oral modifications of written contracts should be enforced because “[t]o hold otherwise is to make the statute of frauds an instrument of fraud; for it would be fraud to allow a person to enforce a contract which he had agreed on sufficient consideration to modify or abrogate after he has accepted the consideration for its modification or abrogation.” Gerard-Fillio, 68 Wash. at 327.

In the present case, testimony at trial established an oral modification to the contract requirement that all flashings had to be copper. Moreover, the Thirys’ actions in not requiring that Crow Roofing re-do the transition and the testimony regarding the copper caps suggest that they accepted the modification. In addition, the performance of Crow Roofing of completing the transition with beveled siding and slate is sufficient to remove any requirement under the statute of frauds that the change be in writing. Finally,

Plaintiff's expert Wetherholt, who has an extensive background and familiarity with slate roofs, (RP 9/23/08, p. 132, ll 7 – p. 136, ll 5) testified that industry codes do not require flashing to be metal and that it would be unusual to use metal flashing with slate since that material does not conform to transition curves. RP 9/23/08, p. 156, ll 13 – p. 159, ll 11. The trial court erred in concluding that any modification to the contract had to be in writing and that, as a result, Crow Roofing breached an agreement to use copper flashing on the entire roof.

F. The Trial Court Erred in Finding that the Defendants' Damages were \$57,000.00.

1. The Evidence presented was insufficient to establish the amount as \$57,000.00.

The Trial Court erred in finding that the Thirys' damages amounted to \$57,000.00. CP 750. The testimony at trial was not sufficient to establish that the Thirys' damages amounted to \$57,000.00. Thirys' expert, Bryce Given, testified that he based his damage estimate not on his own cost analysis, but solely on the cost analysis prepared by Robert Westlake of Alpha Pacific

Roofing². RP 9/18/08 p. 180, ll 22 - p. 181, ll 14. Mr. Given stated that he personally had “a background as a project manager and estimator, but not for slate roofing.” RP 9/18/08 p. 180, ll 20-21. Given testified that his review of Mr. Westlake’s credentials consisted of a discussion with another contractor who had “used Mr. Westlake on several projects before;” that he did not know whether Mr. Westlake had undertaken projects involving natural slate, as opposed to manufactured slate; and had not inquired whether he was a licensed contractor or whether he was classified as a roofing contractor by the Department of Labor & Industries to employ individuals to perform roofing work. RP 9/22/08 p. 77, ll 12-25, p. 78 ll 1-9. The court allowed the testimony over objection of Crow Roofing’s attorney, stating that the fact that Mr. Given relied on Mr. Westlake’s “Proposal” went to the weight, but not the

² The Thirys identified Mr. Westlake as a witness in the Joint Statement of Evidence. CP 701-710. On the second day of trial, Thirys’ counsel advised the court that Mr. Westlake “preferred” not to testify. RP 9/22/08 p. 7, ll 15 – p. 9, ll 25. Mr. Westlake was, accordingly, served with a subpoena by Crow Roofing (CP 340-343) but failed to appear. RP 9/22/08 p. 8, ll 12-25; RP 9/23/08 p. 21, ll 7-9.

admissibility, of the cost analysis. RP 9/18/08 p. 179, II 13 - p. 180, II 14.

Plaintiff's expert Wetherholt, on the other hand, had experience with evaluating slate roofs, RP 9/23/08 p. 132, II 7 - p. 133, II 8. Wetherholt testified that he had reviewed a Cost Analysis prepared by Crow Roofing, Ex. 26. He further testified that he received and reviewed a breakdown of labor and material costs of repair work prepared by Carolyn Vares, President of Crow Roofing; that he received and reviewed back-up information regarding wage and hour requirements in addition to cost materials required; that the method of preparing the cost analysis conformed with the procedure that he uses in preparing such analyses; and that the itemized costs of repairs in the analysis totaling \$9,989.00 were reasonable. RP 9/23/08 p. 165, II 21 – p. 169, II 8. Mr. Wetherholt also observed that Mr. Westlake's Proposal, relied upon by Mr. Given, was not a bid or a cost analysis but, instead, an estimate that expressly recited "cost plus" rather than a specific amount. CP 9/23/08 p 172, II 24 – p. 173, II 11. The cost analysis is significantly less than the \$57,000 testified to by Mr. Given, taken from Westlake's cost plus "Proposal."

2. The amount of damages awarded was excessive given the nature of the defects.

The Washington Supreme Court has adopted Section 348 of Restatement (Second) of Contracts, in preference to concepts of substantial completion and unreasonable economic waste, as the appropriate rule for determining damages in a case such as this.

The alternatives set out in Restatement (Second) § 348, at 119-20, include measures of damages specifically applicable to construction contracts.

(1) If a breach delays the use of property and the loss in value to the injured party is not proved with reasonable certainty, he may recover damages based on the rental value of the property or on interest on the value of the property.

(2) If a breach results in defective or unfinished construction and the loss in value to the injured party is not proved with sufficient certainty, he may recover damages based on (a) the diminution in the market price of the property caused by the breach, or (b) the reasonable cost of completing performance or of remedying the defects if that cost is not clearly disproportionate to the probable loss in value to him.

The comments to section 348 include a helpful discussion of the considerations applicable to a determination of damages for a breach of the construction contract. Comment C at page 121 is especially relevant to this case and is here set out in full:

Sometimes, especially if the performance is defective as distinguished from incomplete, it may not be

possible to prove the loss in value to the injured party with reasonable certainty. In that case he can usually recover damages based on the cost to remedy the defects. Even if this gives him a recovery somewhat in excess of the loss in value to him, it is better that he receive a small windfall than that he be under-compensated by being limited to the resulting diminution in the market price of his property.

Sometimes, however, such a large part of the cost to remedy the defects consists of the cost to undo what has been improperly done that the cost to remedy the defects will be clearly disproportionate to the probable loss in value to the injured party. Damages based on the cost to remedy the defects would then give the injured party a recovery greatly in excess of the loss in value to him and result in a substantial windfall. Such an award will not be made. It is sometimes said that the award would involve “economic waste,” but this is a misleading expression since an injured party will not, even if awarded an excessive amount of damages, usually pay to have the defects remedied if to do so will cost him more than the resulting increase in value to him. If an award based on the cost to remedy the defects would clearly be excessive and the injured party does not prove the actual loss in value to him, damages will be based instead on the difference between the market price that the property would have had without the defects and the market price of the property with the defects. This diminution in market price is the least possible loss in value to the injured party, since he could always sell the property on the market even if it had no special value to him.

Eastlake Construction Company v. Hess, 102 Wn.2d 30, 47-48, 686 P.2d 465 (1984) (emphasis added).

To the extent that the court determined that portions of the completed work were defective, the Thirys are entitled to recover

only the costs to remedy the defects, and only to the extent that such amounts are not disproportionate to the loss of value sustained.

G. The Trial Court Erred in Failing to Grant Plaintiff Pre-Judgment Interest on the Unpaid Contract Amount, Adjusted by any Offset to the Defendants.

At the February 20, 2009, hearing on entry of Judgment, the trial court stated that Crow Roofing would not be awarded pre-judgment interest:

MS. GAY: Well, we presented Your Honor legal citations that showed that it [prejudgment interest] would be allowed on the offset amount after the contract amount is reduced by the amount of the defective workmanship.

THE COURT: Well, let me just say flat out so you've got a good clear record for appeal, no interest on the unpaid amount."

RP 2/20/09 p. 8, ll 13-19.

The trial court erred as a matter of law in refusing to grant Crow Roofing prejudgment interest on the unpaid contract amount from March 10, 2006, adjusted by any offset to the Defendants.

The award of prejudgment interest is based on the public policy that a person retaining money belonging to another should pay interest to compensate for the loss of its use value. Buckner, Inc. v. Berkey Irrigation Supply, 89 Wn.App. 906, 916-17, 951 P.2d

338 (1998). Prejudgment interest is generally payable on liquidated claims. Hansen v. Rothaus, 107 Wn.2d 468, 473, 730 P.2d 662 (1986). A claim is liquidated when the amount is determinable with exactness and without reliance on opinion or discretion. Seattle v. Dyad Construction, 17 Wn.App. 501, 520, 565 P.2d 423 (1977). In this case, the amount owed to Crow Roofing under its contract is exact and readily ascertainable without reliance on opinion or discretion. Indeed, Dr. Thiry did not produce any evidence to contradict Crow Roofing's claim that the amount unpaid under the contract is \$102,416.83. RP 9/18/08 p. 56, ll 2-10.

Crow Roofing is entitled to prejudgment interest even though the court awarded an offset for any damages in favor of the Thirys. While generally unliquidated offsets are not deducted prior to calculating prejudgment interest, an exception to this rule was adopted by the court in Mall Tool Co. v. Far West Equipment Co., 45 Wn.2d 158, 177, 273 P.2d 652 (1954) in cases where the defendant's counterclaim arises out of the same contract and is a result of defective performance by the plaintiff. The offset is deducted from the liquidated claim and prejudgment interest is then calculated on the amount remaining after setoff. Gemini Farms

LLC v. Smith-Kem Ellensburg, Inc., 104 Wn.App. 267, 269, 16 P.3d 82 (2001).

RCW 19.52.010 provides that “[e]very loan or forbearance of money, goods, or thing in action shall bear interest at the rate of twelve percent per annum where no different rate is agreed to in writing.”

Crow Roofing should be awarded prejudgment interest from the date of its loss, the date on which the contract amount should have been paid, at the rate of 12% on \$102,416.83, subject only to set off, if any, of the amount finally awarded to Defendants on their counterclaim.

H. The Trial Court Erred in Finding that Defendants Thiry Were the Prevailing Party for an Award of Attorneys’ Fees.

The mechanic’s lien statute, RCW 60.04.181(3), gives the court discretion to award the prevailing party its costs, attorneys’ fees and necessary expenses incurred by the attorney, as the court deems reasonable. RCW 60.04.181(3) provides that

(3) The court may allow the prevailing party in the action, whether plaintiff or defendant, as part of the costs of the action, the moneys paid for recording the claim of lien, costs of title report, bond costs, and attorneys’ fees and necessary expenses incurred by

the attorney in the superior court, court of appeals, supreme court, or arbitration, as the court or arbitrator deems reasonable. Such costs shall have the priority of the class of lien to which they are related, as established by subsection (1) of this section.

Plaintiff Crow Roofing is clearly the prevailing party, both as to the form of relief granted and the measure of damages.

1. The Trial Court erred in finding that the Defendants did not dispute the unpaid amount due under the contract.

The Trial Court erred in its Finding of Fact 2.7 in which it stated in part that “Defendants do not dispute the unpaid amount due under the contract.” CP 747. In its Amended Complaint dated June 30, 2008, at paragraph 2.4, Crow Roofing stated: “There is now due and owing to Plaintiff for furnishing and supplying labor, materials and equipment under the terms and conditions of said contract, the sum of \$102,416.83 with interest at the rate of Twelve (12%) per annum from March 10, 2006 until paid, together with applicable lien costs and/or attorney fees and costs.” CP 511-512. Defendant Thiry’s Answer to Plaintiff’s Amended Complaint dated August 19, 2008, stated: “Regarding Plaintiff’s section 22.4 Denied.” CP 607-610.

Moreover, at the February 20, 2009, hearing regarding presentation of the judgment, in connection with the issue of prejudgment interest, Judge Fox stated: “I mean, this is not an

appropriate case for prejudgment interest. I found that the work was not done properly and there was an honest dispute as to what was owed.” RP 2/20/09 p. 8, ll 9-12.

2. The Thirys did not prevail on their claim to have the roof replaced.

Throughout this lawsuit, the Thirys have counterclaimed for a complete replacement of the roof in the approximate amount of \$170,000. On the second day of trial, Thirys’ counsel attempted to elicit testimony from expert Bryce Given in support of replacement of the roof. RP 9/22/08 p. 183, ll 4 – p. 187, ll 13. Again, in colloquy with the court on the last day of trial, the court was informed that Thiry’s expert witness (Given) stated in pre-trial deposition that he did not think the entire roof needed to be replaced. RP 9/23/08 p. 14, ll. 7 – 25. The court affirmed that the scope of the Thirys’ claim was limited to repairs by prior motion *in limine* excluding that testimony by a previously disclosed expert (RP 9/23/08 p. 21, ll. 7-15) The court noted the Thirys’ acknowledgment in the record that the Thirys were not seeking a complete roof replacement. Even after trial, in their letter to Judge Fox enclosing their proposed Findings of Fact, Thiry contended that only a complete replacement of the roof would make them whole.

See Motion to Allow Additional Evidence pending as of the date of submission of this Brief.

At trial, Thirys' attorney, Mr. Singer, stated: "I think if we look at our original complaint, we talked about replacing the roof, and we've talked about replacing the roof on many occasions, Your Honor." RP 9/18/08, p. 184, ll. 9-12. Clearly the Thirys were seeking damages equivalent to the cost of replacement and, in fact, were awarded \$57,000 plus tax, as opposed to an award of damages of \$170,000 cited in the Thirys' submissions to the court but unsupported by the evidence.

The Thirys' claim for a complete replacement, and the Court's finding that they were entitled only to a setoff for repairs should have been taken into account when determining who the prevailing party was for awarding fees and costs.

3. Crow Roofing is the prevailing party.

Crow Roofing is the prevailing party even if the Court determined that the Thirys abandoned their claim for a complete roof replacement. In Sardam v. Morford, 51 Wash.App. 908, 911, 756 P.2d 174 (1988), Division III of this court held that the determination of what constitutes a "prevailing party" as that term is used in RCW 59.18.280 and RCW 4.84.330 is usually determined

by which party receives a money judgment. See also Silverdale Hotel Assocs. v. Lomas & Nettleton Co., 36 Wash.App. 762, 773-74, 677 P.2d 773, *review denied*, 101 Wash.2d 1021 (1984). Marassi v. Lau, 71 Wash.App. 912, 915, 915 n. 3, 859 P.2d 605 (1993) (quoting RCW 4.84.330). RCW 4.84.330 states: "As used in this section "prevailing party" means the party in whose favor final judgment is rendered." In the present case, the contract amount of \$102,416.83 was found to be due Crow Roofing; Thiry was awarded repairs in the amount of \$61,902.00 (\$57,000 plus SST) the amount found to be due the Thirys as a setoff against the contract price. Therefore, even without an award of prejudgment interest, before an award of fees and costs, Crow Roofing would be entitled to a judgment against the Thirys for \$40,514.83. Crow Roofing clearly prevailed on its claim for the unpaid contract balance. The trial court erred in finding that the Thirys were the prevailing party.

Moreover, even though the Thirys prevailed on their counterclaim for repairs, it does not follow that Crow Roofing is not the prevailing party. The recent case of Torgerson v. One Lincoln Tower, 166 Wn.2d 510 (2009) is instructive here. In that case, the buyers of condominium units sought relief from the sellers on

claims of breach of contract. The trial court entered summary judgment in favor of the sellers, ordering the sellers to return the buyers' earnest money deposits. The trial court, however, ruled that the sellers were not entitled to attorneys' fees under the contract because "judgment" was not rendered against the buyers. The Court of Appeals reversed the trial court on the issue of attorneys fees and costs, and the Supreme Court upheld the Court of Appeals. Citing Piepkorn v. Adams, 102 Wn. App. 673, 686, 10 P.3d 428 (2000), the Torgerson Court held that the term "prevailing party" in a bilateral contract should be interpreted to mean the *substantially* prevailing party (citing Marassi v. Lau at 916, which discusses the "proportionality approach").

If neither party wholly prevails, then the party who substantially prevails is the prevailing party - a determination which turns on the extent of relief awarded the parties. Marassi, 71 Wash.App. at 916, 859 P.2d 605. Riss v. Angel, 80 Wash.App. 553, 912 P.2d 1028 1996. In the instant case, Crow Roofing was awarded the entire undisputed contract price, 160% of the amount of set-off for repairs, with a net affirmative amount, with interest, equal to 87% of the set-off allowed to Defendants Thiry. The outcome is similar to the facts of Mortizky v. Heberlein, 40 Wn.App. 181, 697

P.2d 1033 (1985), which also involved a dispute between a contractor suing for foreclosure of a lien and a homeowner who counterclaimed for incomplete construction. The court foreclosed the contractor's lien for the full amount of its claim of \$2,092.93, awarded the homeowner \$4,937 on its counterclaim, and also awarded the contractor reasonable attorneys' fees of \$2,008. The trial court expressly held that the contractor's lien would be set off against the homeowner's damages and provided a net affirmative judgment in favor of the homeowners. On appeal, the appellate court noted that the homeowner in that case received the affirmative net judgment on its compulsory counterclaim and that an award of fees in favor of the contractor was an abuse of discretion. The case held that the affirmative net judgment doctrine should apply and the case was remanded to the trial court to determine attorneys' fees to be awarded to the homeowners as the prevailing party.

In this case, Crow Roofing substantially prevailed. The court found that Crow Roofing was due the contract balance of \$102,416.83 compared to the \$61,902.00 found for the Thirys. Crow Roofing, the party to whom the net affirmative judgment was awarded, is clearly the prevailing party.

4. If neither party can be determined to be the prevailing party at trial, then neither party should be awarded their attorneys' fees and costs.

If the court determines that Crow Roofing is not the prevailing party, then neither party should be awarded fees and costs. Where both parties prevail on major issues, neither is a “prevailing party” entitled to attorney fees. Sardam, 51 Wash.App. at 911, 756 P.2d 174. Clearly, Crow Roofing prevailed on its claim for payment of the contract balance. If the court determines that the Thirys’ claim for repairs, as opposed to their claim for complete replacement, was nonetheless a major issue, then both parties prevailed and neither is a “prevailing party” for purposes of awarding fees and costs. At the very least, the Thirys are not entitled to an award of fees and costs.

- I. **Crow Roofing Requests its Attorneys’ Fees and Costs Incurred on Appeal.**

RAP 18.1 provides that a party can recover reasonable attorneys’ fees and costs incurred on review before the Court of Appeals if applicable law grants the party that right and the party devotes a section of its opening brief to that request. Haselwood v. Bremerton Ice Arena, 166 Wn. 2d 489, 502-503 (2009).

Should Crow Roofing prevail in this appeal, Plaintiff Crow Roofing requests that it be awarded its reasonable attorneys' fees incurred in successfully prosecuting this appeal. As cited above, the mechanic's lien statute, RCW 60.04.181(3), gives the appellate court discretion to award the prevailing party its costs, attorneys' fees and necessary expenses incurred by the attorney.

V. CONCLUSION

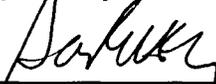
For the reasons stated above, Crow Roofing & Sheet Metal Inc. requests as follows:

- A. That the trial court's decision awarding the Thirys a set-off in the amount of \$57,000 plus tax be remanded taking into account that (1) Crow Roofing was not required under the contract to detect the warped rafter tail; (2) that the ice and water shield was installed; and (3) that the Thirys consented to an oral modification of the contract as to the transition flashing permitting the installation of wooden shims and slate instead of copper at the slope change.
- B. That the Thirys' failed to give evidence of damages for specific items of repair and, accordingly, their counter claim should be denied.
- C. That the trial court's decision that the Thirys are the prevailing party be reversed; that Crow Roofing be declared to be the prevailing party; and the issue remanded for an award of attorneys fees and costs to Crow Roofing.

- D. That the trial court's decision that Crow Roofing is not entitled to prejudgment on the unpaid contract price be reversed, and that Plaintiff be awarded prejudgment interest on the unpaid contract amount, reduced by the offset due the Thirys upon recalculation of damages.
- E. That Crow Roofing's Mechanics and Materialmen's lien on the subject property be reinstated in an amount to be determined on remand.
- F. That Crow Roofing be awarded its attorneys' fees and costs incurred on appeal herein.

DATED: August 27, 2009

Respectfully submitted,



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JB029\Crow Roofing\Julius Thiry\Appeal\ Appellate Brief

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

NO. 63173-0-1

CROW ROOFING & SHEET METAL, INC.

Appellant,

vs.

JULIUS THIRY and KATHERINE J. THIRY, et ux., et al.,

Respondents.

**CERTIFICATE RE:
DECLARATION OF SERVICE: BRIEF OF APPELLANT**

I, **Sandra Bates Gay**, of Sandra Bates Gay, P.S., counsel for Appellant, certify that the **Brief of Appellant** in the form attached hereto was duly filed with the Clerk of Court of King County Superior Court, under Cause No. 06-2-29465-3SEA on the 27th day of August, 2009.



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CROW ROOFING & SHEET METAL, INC.

CERTIFICATE OF SERVICE

I, **JAYMEE BOND**, certify that on the 27th day of August, 2009, a true and correct copy of the attached Brief of Appellant was served on the attorney of record for Respondents herein, by delivery to the U.S. Postal Service, Express Mail, postage prepaid, addressed to the following:

Charles K. Wiggins
Wiggins & Masters, PLLC
241 Madison Avenue North
Bainbridge Island, WA 98110



JAYMEE BOND

AW054\Crow Roofing\Thiry Julius\Appeal\Cert Svc